NO. 372

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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL and FRANCES SHERMAN,

Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,

Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL; FRANCES SHERMAN; ELECTRICIANS LOCAL NO. 449; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 983; BOILERMAKERS UNION NO. 182; POCATELLO LABOR COUNCIL, known as the POCATELLO CENTRAL LABOR COUNCIL; CLARENCE LOTT; J. A. RUSSELL and MIKE MORELLI,

Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS

L. E. HAIGHT
Continental Bank Bldg.
Boise, Idaho

O. R. BAUM
RUBY Y. BROWN
P. O. Box 570
Pocatello, Idaho

L. F. RACINE
Itex Building
Pocatello, Idaho

Attorneys for Appellees

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J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS

Appellee C. H. Elle Construction Co., and Appellee J. R. Simplot Company, pursuant to Rule 16 of the Revised Rules of this Court, each move to dismiss the appeal in each of the above entitled cases, on the grounds (a) that the appeals, and each of them, do not present a substantial federal question, (b) that the federal questions sought to be raised

were not, in either of such cases, timely or properly raised or expressly passed upon by the court below, and (c) that the judgment in each case rests on an adequate non-federal basis.

STATEMENT OF CASE

The two cases under consideration are companion appeals[1] from final judgments and the decision of the Supreme Court of the State of Idaho, reversing judgments in each case of the trial court, the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, Idaho. Appellees have obtained the Record paging as used by the appellants and have numbered their transcript likewise, and in referring to the contents of the transcript will indicate the Record page numbers.

The Supreme Court of Idaho, in reversing the judgments of the Idaho District Court, found that the activities of the defendant Unions in picketing the entrance to the J. R. Simplot Company Plant at Don, Idaho, and otherwise forcing economic sanctions upon C. H. Elle Construction Co., and J. R. Simplot Co., were in violation of the Secondary Boycott Act of Idaho, Secs. 44-801 to 44-803, Idaho Code, that no labor dispute existed, that the activities of the Unions were not proper exercises of freedom of speech or of the press, and that the temporary injunction originally

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[1] Although filed as separate appeals, the appellants in Cases Nos. (Idaho Supreme Court) 8174 and 8175 have filed a joint statement as to the jurisdiction in the two appeals. Both appeals are presented on a single record. Appellees C. H. Elle Construction Company, a corporation, and J. R. Simplot Company, a corporation, and J. R. Simplot Company, a corporation doing business under the firm name and style of Simplot Fertilizer Company, have filed their motion to dismiss the appeals or affirm the judgments as a single instrument in the two cases.

issued by the trial court, in each case, should be made permanent.[a]

The Idaho trial court found against Simplot and Elle and in favor of the Pocatello Building & Construction Trades Council. Counsel for the defendant Pocatello Building Trades Council, et al, prepared Findings of Fact, Conclusions of Law, and a Decree in each case, and the trial Court thereafter signed the same. Hence the appellants in the Idaho Supreme Court were Simplot and Elle. No cross-appeal was taken by the appellants herein as to the judgment that was finally rendered in each case by the trial court, although the Findings of Fact and Conclusions of Law as entered by the trial court and upon which the decree appealed from was based, contained the following:

In the Elle case:

Findings of Fact 8 (R. 482):

> "8. That the business of the plaintiff herein does not affect or constitute interstate commerce within the meaning of the Labor Management Relations Act of 1947, 39 U. S. C. 151, et seq."

Conclusions of Law numbered 2, 3, 4 (R. 482):

> "2. That plaintiff is not engaged in interstate commerce within the meaning and scope of the Federal Labor Management Relations Act of 1947, 29 U. S. C. 151 et seq.
>
> "3. That the Court's power and jurisdiction herein is not preempted or supplanted by the Federal Labor Management Relations Act of 1947, 29 U. S. C. 151, et seq.

[a] Appendix A., Jurisdictional Statement, P. 22-31.

"4. That the conflict exisiting between the rules, regulations and objectives of the defendants and the conditions and building contract provisions prevailing at and pertaining to the Simplot Fertilizer Company's conversion job, respecting which plaintiff required his employees to work, constituted a dispute between plaintiff and defendants."

And in the Simplot case:

Findings of Fact numbered 8, 13, and 15 (R. 446):

"8. That during the summer of 1952 the plaintiff commenced a major conversion and re-construction of its Don, Idaho plant to change the product therefrom from one kind of fertilizer to a different kind of fertilizer which necessitated the change in much of the facilities and equipment of the said plant; and that there was no labor dispute exisiting between the CIO Oil Workers International Union and the plaintiff or its employees.

"13. That defendants have not been certified by the National Labor Relations Board as a bargaining agent for plaintiff's employees.

"15. That a 'dispute' arose and existed between plaintiff and the defendants within the meaning of Section 44-703, Idaho Code."

Conclusions of Law numbered 1, 3 and 4 (R. 446-447):

"1. That a dispute existed between the respective parties hereto within the meaning, scope and perview of Section 44-703 Idaho Code.

"3. That the power and the authority of this court to hear and determine this cause is not preempted or supplanted by the provisions of the Labor Management Re-

lations Act of 1947, 29 U. S. C. 151, et seq.

"4. That the defendants' picketing and advertising activitiy herein did not constitute a wrongful or unlawful secondary boycott of the plaintiff or others."

In the Elle case Findings of Fact are numbered 1 to 8, inusive, and Conclusions of Law are numbered 1 to 8, inclue (R. 480-483.) In the Simplot case Findings of Fact are umbered 1 to 16, inclusive, and Conclusions of Law are umbered 1 to 6, inclusive. (R. 441-447.)

No cross-appeal from the Findings, Conclusions, and dgments, was taken by appellants.

The Statement of Appellants refers to "Labor Board roceedings."[3] The fact is that there were never any Labor oard proceedings involved in this dispute as to either of the pellees, and the issues and problems presented by the apal did not involve any proceedings before the Labor Board. t no time was any attempt ever made by any of the parties this appeal to take the problems and issues here presented fore the National Labor Relations Board. The labor proedings before the National Labor Relations Board referred by appellant (Jurisdictional Stmt. P. 13) had to do with prior unrelated matter long before the instant matter and t involving Elle Company in any fashion. (R. 5-6).

The Dispute: During the summer of 1952 the Simplot mpany undertook to convert its fertilizer plant from the oduction of single phosphate to triple super phosphate, and the course of accomplishing that conversion contracted ith C. H. Elle Company on a cost plus basis, to do forming ork, machinery erection and installation incident to that

[3] Jurisdictional Statement, p. 4.

conversion (letter dated July 1, 1952; R. 302-303, 443).[4] Simplot Company reserved to itself, and did not contract with the Elle Company, the fabrication of certain stainless steel tanks and parts that were required in the new plant. The Unions, appellants herein, determined that they were going to do all work, including fabrication of the tanks and small parts, or none at all; that to force Simplot to give that portion of the conversion to the Elle Company or to some other AFL contractor they would picket the Simplot plant (R. 108-110). The Simplot company had no AFL employees involved in the dispute and appellants did not represent any employees of the Simplot plant involved in this matter (R. 108, F. 157). The appellants represented only employees of the Elle Construction Company (R. 108). The record is replete with assertions of representatives of the appellant Unions that no dispute existed between Elle Company and its employees who were members of the appellant Unions (R. 111 and 118). However, by placing a picket at the entrance to the Simplot plant the appellant Unions expected that Elle's employees would not cross the picket line. (R. 110-112). Although Simplot employees, not members of appellant Unions, would cross the line, the construction work would be effectively stopped, because that work was being accomplished by Elle employees. Thus the appellant Unions planned to, and did until the trial court issued a temporary injunction, prevent both the Simplot Company and the Elle Company from proceeding with the work of conversion. This was done in spite of the fact that Simplot had no employees represented by appellant Unions (R. 108) and therefore could not be in a labor dispute with appellant Unions.

The trial court found that a dispute (as distinguished

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[4] See Appendix B, Jurisdictoinal Statement, pp. 34, 35, 36.

from a labor dispute) existed between the respective parties within the meaning, scope and purview of Sec. 44-703, Idaho Code, and this finding was made notwithstanding the fact that Title 44, Chapter 7, Idaho Code, Sec. 44-703 being a part of such Title and Chapter, defined a labor dispute. Such a finding was held erroneous by the Idaho Supreme Court. The trial court finding was made in spite of the fact that the Elle Company had no dispute with any of its employees. The only true object of the Unions was the desire of the additional work of fabrication, which was not covered by the Elle contract with the Simplot Company and was not a legitimate item which the Unions could insist that Simplot give Elle's employees.

The trial court did determine in each case, that is to say, in the Simplot case and in the Elle case, that its jurisdiction was not supplanted by the National Labor Relations Act. But the trial court found that the Secondary Boycott Act of Idaho was not applicable and that the activtiies of the Unions were protected activities within the Constitution of the United States and the State of Idaho. The entire decision of the trial court was based, in both cases, on grounds other than the "Commerce Clause" and the Labor Management Act of 1947.[5]

The Supreme Court of Idaho found that the dispute must be one that is not foreign to the relationship of employer and employee, or between labor and management.[6] The Supreme Court of Idaho likewise found that the dispute was not one coming within the purview of Secs. 44-701 to 44-713, Idaho Code, and that the matters and things complained about were violative of the provisions of the Secondary Boycott Act, Secs. 44-801 to 44-803, Idaho Code.

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[5] Finding of Fact, Simplot Case No. 15, R. 446; Conclusion of Law 3, R. 447.

[6] Appendix A, Jurisdictional Statement, p. 29.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND IN ANY EVENT WERE NOT TIMELY OR PROPERLY RAISED AND THE JUDGMENT OF THE SUPREME COURT OF IDAHO RESTS ON ADEQUATE NON-FEDERAL BASIS.

Briefly stated, the questions presented by appellants are whether:

1. The cases are within the jurisdiction conferred upon the National Labor Relations Board by the National Labor Relations Act.

2. The state courts of Idaho as a consequence are without power to exercise any jurisdiction over the factual matters presented to the Idaho courts in these cases.

Appellants do not urge upon this Court any other basis for this appeal than the contention that the Idaho Courts had no jurisdiction. We do not believe that the questions presented are of a substantial federal nature, for the reason that no labor dispute as defined by the statutes of Idaho or by the Labor Management Relations Act were here involved and the acts of appellants were contrary to the announced public policy of Idaho.

The pertinent Idaho statutes are the following:

> "44-712. Labor dispute defined. — The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.
>
> "44-801 (Secondary Boycott Act). It shall be unlawful to cause or threaten to cause, and/or combine

> or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom such labor dispute exists to comply with any particular demands."

National Labor Relations Act as amended, Sec. 2 (9), 29 U. S. C. 151 ff, provides:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee."

The Supreme Court of Idaho did hold the state court's jurisdiction had not been supplanted by the Federal Labor Act, and cited cases in support from its Court as well as this Court. (Jurisdictional Statement—Appendix A, P. 27-28).

I. THE SUPREME COURT OF IDAHO HAD JURISDICTION TO HEAR THESE CASES AND PROPERLY EXERCISED IT.

While it is true that the appellants herein stated in their Answer that the matters in controversy were exclusively within the jurisdiction of the National Labor Relations Board, the appellants did not, after the trial court had handed

down its memorandum decision and Findings of Fact and Conclusions of Law and decree were entered in each case, file a cross-appeal. Hence the only matters directly before the Supreme Court of the State of Idaho were those matters and things contained in the Assignment of Errors as set forth in the briefs prepared by the appellees here. The Trial Court found Elle not to be in interstate commerce and both Elle and Simplot not to be in such activity as would give the National Labor Board exclusive jurisdiction.

The fact that Simplot may have or may not have been dealing in interstate commerce plays no important part in this matter, as the dispute, if there ever was a dispute, whatever it might have been, was not a labor dispute and the picketing was against the public policy of the State of Idaho, as announced by the legislature and the judiciary of the state, and prohibited.

Journeymen Plumbers v. Graham,
345 U. S. 192; 97 L. Ed. 946;

Building Service Employers v. Gazzam,
339 U. S. 532; 94 L. Ed. 1045;

Teamsters Union v. Hanks,
339 U. S. 470; 94 L. Ed. 995;

Giboney v. Empire Storage & Ice Co.,
336 U. S. 490; 93 L. Ed. 834;

Thornhill v. Alabama,
310 U. S. 88; 84 L. Ed. 1093;

Chucales v. Royalty (Ohio),
163 O. S. 373; 127 NE 2d 203;
Cert. denied U. S. Supreme Court May 7, 1956;

Pappas v. Stacey (Maine),
116 A. 2d 497;
Appeal dismissed Oct. 24, 1955,
76 S. Ct. 117;

Gilbertson v. Culinary Workers (Ore.),
282 P. 2d 632 (organizational picketing prohibited by statute);

Voght Inc. v. I. B. T. Local 695 (Wisc.),
74 NW 2d 749;

Poffenroth v. Culinary Workers Union Local,
71 Idaho 412; 232 P. 2d 968;

Tarr v. Amalgamated Assn. of Street Electric Ry. & Motor Coach Employees of America,
73 Idaho 223; 250 P. 2d 904;

State v. Casselman,
69 Idaho 237; 205 P. 2d 1131;
Cert. denied 94 L. Ed. 554;
Rehearing denied 94 L. Ed. 588.

THE JUDGMENT IN EACH OF THE CASES HERE INVOLVED RESTS ON ADEQUATE NON FEDERAL BASIS.

A reading of the decision of the Supreme Court of Idaho can lead, we think, fairly to the conclusion that the case rests on an adequate non-federal basis, in this—

(1) No labor dispute existed between the CIO Oilworkers International Union and Simplot or the employees of Simplot;

(2) The dispute, if there was a dispute, was clearly distinguishable from a labor dispute;

(3) The Union set itself up as the construction unit for all Southeastern Idaho, and this position was taken notwithstanding the fact that it did not have any contract with Simplot or any of the Simplot employees;

(4) If the Unions desired Elle not to work and Elle's employees not to work then the picketing should have been directly against Elle rather than Simplot. But the fact was the Union had no dispute with Elle and wanted Simplot to give the Elle company more work.

(5) Elle's activities were based on the contract he had with Simplot, and Elle could go no further than do the work that he contracted to do. The AFL Unions, representnig Elle employees, did not picket Elle directly because they had no dispute with Elle, but they did attempt to force upon Simplot the assignment of work to Elle by picketing Simplot at the single entrance to the Simplot Plant, knowing Simplot employees would cross but Elle's men would not.

The Idaho Supreme Court found the contention of the Union that it had no jurisdiction in the matter and that all questions that were in dispute had been pre-empted and supplanted and covered by the Federal Act not well taken.[7] The cases cited under subheading I of this brief we believe fully support such action of the Idaho Supreme Court.

The questions the appellants seek to raise in the instant matter were not expressly passed upon by the court below for the reason the appellants never saw fit to cross-appeal from the decision of the Idaho Trial Court. The Supreme Court of the State of Idaho found that the anti injunction statute, 44-701 to 44-713, Idaho Code, covers certain regulations and relationships between labor and management and

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[7] Jurisdictional Statement, pp. 27 and 28.

that the dispute referred to in Subdivision (e) of Sec. 44-703, Idaho Code, means a labor dispute as defined by Sec. 44-712, Idaho Code, and not a dispute foreign to that relationship.[8]

Reference is made in the Jurisdictional Statement to the fact that one Hilbun was informally consulted[9], and a reading of the record as to just what took place in the office of O. R. Baum discloses that Mr. Hilbun was discussing other matters and that during a phone call some conversation was had and the suggestion was made as to a meeting. The Union at no time ever sought to submit the matter to the National Labor Relations Board and took no steps either before or after the actions in question had been filed to have the matter submitted to the Board. This fact, we think, is sufficient to show that the decision of the Idaho Supreme Court rests on an adequate non-federal basis and the Union so recognized in failing to cross-appeal from the Trial Court's Judgment and Conclusions that the Idaho Court had jurisdiction and in failing to attempt to secure a hearing before the National Labor Relations Board.

Appellants assert that the illegality of the Union conduct is fully regulated by the federal act and refer to Sec. 8 (b) (4) (D), 8 (b) (4) (C), and 8 (b) (4) (A) of the Taft-Hartley Act, and then cite cases in support of their interpretation of each of the subdivisions of such section. Appellants take the position that peaceful picketing as conducted in the instant case is violative of Sec. 8 (b) (4) (A). No precedent exists for this conclusion, and we believe that such a conclusion is contrary to decisions beginning in 1949, and we do not believe Congress has outlawed under the Taft-Hartley

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[8] Jurisdictional Statement, Appendix A, p. 29.
[9] Jurisdictional Statement, p. 19.

Act such activities as were carried on in the instant matters.[10] However, such activities were positively violative of the public policy of Idaho.

One of the matters that undoubtedly convinced the Idaho Supreme Court the dispute was something other than a labor dispute and perhaps was quite persuasive in the Idaho Court arriving at its's decision, was the evidence pertaining to the activtiies of the Unions in reference to the demand for $2 per man per week.[11] Such conduct illustrated the desire to secure monies but recognized that the Simplot men from whom such monies were sought were in no fashion represented by the Unions.

The appellants ask this Court to disregard the fact that Simplot employed no members of the appellant Unions, and to disregard the fact that the appellant Unions avowed they had no labor dispute with Elle Company and no labor dispute with Simplot. The appellants further request the Court to disregard the public policy of the State of Idaho as announced by its legislature and by its courts; likewise, this Court is asked to disregard the fact that appellants took no cross-appeal. The picketing was not protected or lawful picketing under any view, either under Idaho law or under Federal law. No attempt was made by any of the parties to seek a ruling from the National Labor Relations Board, and, in fact, the factual situations were not such that that Board would have acted. In such a situation the appellees sought relief in the state court, there being sound legislative act and

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[10] Jurisdictional Statement, pp. 27 and 28.
[11] Jurisditional Statement, p. 26.

judicial decision supporting the entitlement of the appellees to relief in the state courts.

Respectfully submitted,

L. E. HAIGHT
Continental Bank Bldg.
Boise, Idaho

O. R. BAUM
RUBY Y. BROWN
P. O. Box 570
Pocatello, Idaho

L. F. RACINE
Itex Bldg.
Pocatello, Idaho

Attorneys for Appellees